UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Criminal No. 92-26-P-C***
	)	
PETER C. ANTONAKOS,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON MOTION TO SUPPRESS

On March 12, 1992 the defendant was indicted for possessing, with intent to distribute, cocaine in violation of 21 U.S.C. ' 841(a)(1). The defendant seeks the suppression of all evidence seized as a consequence of the stop of his vehicle by a Maine state trooper on November 25, 1991, as well as any statements made by him subsequent thereto. An evidentiary hearing was held on May 11, 1992. I recommend that the following findings of fact be adopted and that the motion to suppress be granted.

I. Proposed Findings of Fact

At approximately 1:00 p.m. on November 25, 1991 Maine State Trooper Edmund Furtado, an experienced law enforcement officer,[1] stopped a vehicle after observing it twice veer sharply across the center line of Route 111, a two-lane roadway in rural Lyman, Maine, and back into the travel lane within a space of a few seconds while positioned closely between two other vehicles. The defendant, who was operating the vehicle, promptly responded to the trooper's emergency lights by pulling off the

[1] Trooper Furtado has eight years of law enforcement experience, four as a Maine State Trooper and four preceding that service as an armed services policeman.

road along Route 35 on which he was then travelling. Although Trooper Furtado had observed only the defendant in the vehicle when he activated his lights, in the process of pulling the vehicle over he noticed that a woman, later identified as Karen Paquette, was seated in the front passenger seat.

Furtado initiated the stop because he suspected operation under the influence of intoxicating liquor or drugs and driving to endanger. Upon approaching the driver's side of the stopped vehicle, he noticed that the defendant's pants were unbuttoned, unzipped and positioned about three inches lower than normal. Although the defendant explained that his pants had unfastened themselves and that his erratic driving resulted from his efforts to resecure them, the trooper strongly suspected that Ms. Paquette had been performing oral sex on the defendant prior to the traffic stop, a circumstance the defendant himself later acknowledged.

Trooper Furtado asked the defendant to produce his driver's license, vehicle registration and proof of insurance. The defendant secured the vehicle registration and insurance certificate from the glove compartment and handed them to the trooper. The registration indicated that the vehicle is registered to Peter Antonakos of Biddeford; the insurance certificate apparently reflected that required insurance coverage was in place. The defendant told the trooper that he was the registered owner of the vehicle. He explained, however, that he did not have his driver's license with him. When asked, he recited his name and birth date and produced a telephone bill that was in the vehicle. He was unable to produce any other identification. In response to the trooper's request for identification directed to Ms. Paquette, she produced her driver's license and explained that she has known the defendant for some fourteen years, that she had worked for his parents, that she and the defendant had been friends since high school and that the defendant is who he said he is.

The trooper, having observed the defendant to be ``overly nervous,''[2] became concerned that the defendant might be operating without a license or under suspension or that there were warrants outstanding against him. He therefore decided he should investigate further. Intending next to conduct a radio check, Furtado concluded he should first make a visual observation of the defendant's physical characteristics. For this reason and, as Furtado testified at the hearing and stated in his report (Deft's Exh. 5), in order to pat down the defendant for weapons for the trooper's own safety,[3] he requested the defendant to step out of the vehicle, which he did.

The trooper informed the defendant that he was going to frisk him and commenced to do so by conducting a cursory pat down of his person for hard objects which might be weapons. In doing so, he felt what he described as a hard object in a pocket of the outer jacket the defendant was wearing.

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[2] Furtado described the defendant as extremely jittery, outwardly nervous and fidgeting with his hands. He testified that the defendant stared straight ahead during most of the time he was talking to him, making little or no eye contact with the trooper.

[3] When pressed to identify those circumstances that led him to be concerned about his safety, Trooper Furtado mentioned only his observation that the defendant appeared unusually nervous and avoided eye contact with him. On cross-examination, Trooper Furtado acknowledged that before the frisk began the defendant had been fully cooperative, that the trooper had detected no odor of intoxicating liquor or drugs, that the defendant's speech was not slurred, that the defendant was not glassy-eyed or otherwise comported so as to suggest that he was under the influence, that neither the defendant nor Ms. Paquette made any threatening gestures and that the trooper observed no contraband.

The defendant then pushed the trooper's hand away stating, ``It's personal." Believing the object might be a knife, the trooper asked the defendant to slowly remove it from his pocket. At this point, the defendant turned himself around presenting his back to the trooper, whereupon the trooper pivoted the defendant back to his original frontal position and himself reached into the pocket retrieving a tightly wrapped clear plastic bag containing several individually wrapped balls of a white powder substance. Believing, based on his training, that the defendant was in possession of cocaine, he handcuffed him, completed the frisk for weapons and subsequently arrested the defendant. The defendant thereafter made incriminating statements.

II. Legal Discussion

The defendant concedes that, under the authority of *Terry v. Ohio*, 392 U.S. 1 (1968), it was reasonable for Trooper Furtado to have stopped his vehicle as he did. The government for its part concedes that if the subsequent frisk of the defendant was not justified the defendant is entitled to prevail fully on his motion to suppress. The threshold issue for decision, then, is whether the weapons search was one permitted under the Fourth Amendment warrant exception articulated in *Terry v. Ohio* as follows:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ``hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

Id. at 27 (citations omitted).

In *Terry*, the Supreme Court fashioned a test of ``objective reasonableness." In doing so, it had in mind a ```balancing [of] the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.* at 21 (quoting *Camera v. Municipal Court*, 387 U.S. 523, 536-37 (1967)). Viewing the totality of the circumstances confronting Trooper Furtado at the time of his pat-down search of the defendant, I conclude that the government has not sufficiently demonstrated that the trooper possessed ``a reasonable belief based on `specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' [his] believing that the [defendant was] dangerous and . . . may [have] gain[ed] immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (quoting *Terry*, 392 U.S. at 21). As a consequence, the frisk and resulting seizure of contraband were impermissible under the Fourth Amendment.

As Trooper Furtado conceded in his suppression hearing testimony, there was nothing about the physical environment of the stop or the behavior of either the defendant or his passenger that led him to be concerned for his own safety other than the defendant's ``overly nervous" demeanor. Indeed, the stop took place in broad daylight on a rural stretch of roadway with no history of or reputation for criminal activity or violence. *Cf. United States v. Trullo*, 809 F.2d 108, 111-12 (1st Cir.), *cert. denied*, 482 U.S. 916 (1987) (presence of vehicle in Boston's high-crime Combat Zone an appropriate factor to be considered in determining reasonableness of *Terry* stop). At the time he conducted the pat-down search of the defendant, the trooper had satisfied himself that the defendant was not under the influence of intoxicating liquor or drugs and that his erratic driving was explained by the fact that his passenger had been performing oral sex on him.

The trooper attributes his decision to investigate further to his concern that the defendant, who was unable to produce his driver's license on request, may have been driving without a license or under

suspension or that there were warrants outstanding against him. Leaving aside the defendant's explanation that he simply did not have his license with him,[4] neither the trooper's hunches alone nor in combination with any of the facts allowed an inference rationally to be drawn that the defendant was armed and dangerous. The defendant had promptly responded to the trooper's signal to pull over and to produce those documents he did have, namely the vehicle registration and certificate of insurance. He answered the trooper's questions appropriately, as did his passenger. The trooper has described no characteristics or behavior, such as furtive movements to conceal objects, that might have given rise to a legitimate concern for his safety.

The government argued at the hearing that Trooper Furtado's request to the defendant that he exit the vehicle itself created a circumstance justifying the frisk, to wit, the presence of the defendant standing outside the vehicle with better access to his pockets. In holding that it is reasonable for an officer to order an occupant out of a properly stopped car, the *Supreme* Court in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), countenanced the pat-down search that subsequently occurred only because, once the detainee left the vehicle, the officer observed a bulge in his jacket leading to a reasonable conclusion that he might be armed and posed a serious and present danger to the officer's safety. *Id.* at 111-12. In the present case, Trooper Furtado made unmistakably clear that at the time he asked the defendant to step out of the vehicle he had already decided to frisk him for weapons. Nothing in the suppression hearing record suggests that the trooper made any observations once the

[4] Under Maine law, driving without one's license in his possession is a traffic infraction deemed so minor that the traffic infraction proceeding must be dismissed if the person charged produces his license not later than 24 hours before the time set for the court appearance. *See* 29 M.R.S.A. ' 531-B.

defendant was standing outside the vehicle that led him to conclude the defendant might be carrying a weapon.

Every time a law enforcement officer approaches a stopped vehicle he places himself at risk. *See id.* at 110. This is so whether the event occurs in the inner city or in rural Maine. However, the inchoate risk inherent in any stop does not alone justify a pat-down search for weapons. Our jurisprudence teaches us that such a search squares with the Fourth Amendment only when specific and articulable facts, together with the reasonable inferences that may be drawn from them, objectively viewed, lead the officer to a reasonable belief that the detainee is dangerous and may have immediate access to weapons. ``Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Terry*, 392 U.S. at 22. Applying this standard, I can only conclude on the facts of this case that the pat-down search of the defendant was constitutionally impermissible.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress be *GRANTED.*

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 13th day of May, 1992.

David M. Cohen
United States Magistrate Judge